No. 87-497

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In The

Supreme Court of the United States

October Term, 1987

JEROME I. FELDMAN, *et al.*,

Petitioners,

vs.

PIONEER PETROLEUM, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' BRIEF IN REPLY TO THE BRIEF OF FIDELITY BANK, N.A.

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Pursuant to Rule 22.5 of the Rules of this Court, Petitioners submit this brief in reply to an argument first raised by Fidelity Bank, N.A. ("Fidelity"), in its brief filed in opposition to the Petition for Writ of Certiorari.

Fidelity argues that the District Court's finding that it aided

and abetted a fraud[1] was of no moment, because, "the presence or absence of such a [COPP] loan would have had no effect upon the position of the IRS with regard to the nondeductibility of an 'investment' in which the investors were never at risk."[2] Building upon that misstatement of the record below[3] Fidelity then proceeds to misinterpret *Brountas v. Commissioner,* 692 F.2d 152 (1st Cir. 1982), an opinion which Fidelity had previously argued to the Court of Appeals and upon which that Court did not rely.

Brountas does not, as Fidelity contends, stand for the proposition that all non-recourse loans, such as "carved out production payment" ("COPP") loans, are shams. As the court in *Brountas* reasoned, determination of whether a COPP loan is too contingent or speculative to be considered a true loan for tax basis purposes depends, among other things, on the nature of the collateral, *e.g.,* the specific production payment (proven wells versus properties where oil has not been found). *Id.,* 692 F.2d at 156-161.

If the transactions represented in the Prospectus, upon which Petitioners relied, had been consummated, then the contemplated oil production would have supported a valid COPP loan within the meaning of *Brountas, supra,* 692 F.2d at 161.

Brountas merely stands for the proposition that the economic viability of COPP loans, and one's ability to take tax deductions

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1. Appendix A, p. 19a.

2. Brief of Fidelity Bank, N.A., In Opposition to Petition for Writ of Certiorari, p. 4.

3. The District Court found, "the Internal Revenue Service audited the investors deductions and found that a valid COPP loan had not been acquired and that the tax shelter was a sham." Appendix A, p. 15a.

with respect thereto, will be determined, in the First Circuit, on a case-by-case basis. *Id.*, 692 F.2d at 161. Here, Fidelity never made the represented loans, and thus a *Brountas* analysis is inapplicable. In any event, *Brountas* does not create any issue because such an analysis would support the validity of the COPP loans, had Fidelity made them.

Here, by the time of trial, the IRS had taken the position, amply supported by the evidence adduced at trial, that Fidelity's COPP loans were shams and, accordingly, deductions taken by Petitioners were subject to large deficiency and interest payments. Contrary to Fidelity's argument, the IRS disallowance was not based upon any application of the "at risk" rules which were adopted after the transactions in question.[4] Rather, the IRS disallowance is solidly based on the fact that Fidelity's COPP loans were never made and thus the transaction was a sham.

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4. The court in *Brountas* recognized that, as here, the "at risk" provisions which were enacted subsequent to the transactions at issue in that case, would have caused a disallowance. Nevertheless, the *Brountas* court stated that it was bound to interpret the law, as it stood, when the deductions at issue were taken. *Id.*, 692 F.2d 153.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari and in this Reply Brief, this Court is respectfully requested to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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